

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERNEST CHAMBERS,

Defendant-Appellant.

UNPUBLISHED

October 25, 2005

No. 254406

Wayne Circuit Court

LC No. 01-010732-01

Before: Fitzgerald, P.J., and Cooper and Kelly, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to do great bodily harm, MCL 750.84, and possession of a firearm during the commission of a felony, MCR 750.227b. He was sentenced to prison terms of twenty-three months to ten years for the assault conviction and two years for the felony-firearm conviction. Defendant appeals as of right. We affirm.

The charges against defendant arise from the shooting of Henry Barksdale. A man who accompanied defendant shot Henry's cousin, Allen Barksdale. Henry testified that defendant pulled a "black, automatic handgun" from his waist area and shot him. Although the gun was not recovered, police recovered spent nine-millimeter shell casings at the scene. Defendant denied owning a nine-millimeter handgun, but informed the police that his wife owned a handgun. Traces of gunshot residue were found on defendant's forehead and between the thumb and forefingers of both of his hands. During a consensual search of defendant's home police discovered a Smith and Wesson semi-automatic handgun, a nine-millimeter Ruger, a blue steel semi-automatic rifle, a Smith & Wesson .44 magnum, and a Mossberg pump action twelve-gauge shotgun. It is undisputed that laboratory tests revealed that none of the weapons discovered in the home discharged the shell casings found at the scene.

Defendant moved to exclude evidence of the weapons found in his home. Specifically, defense counsel argued that the evidence was not relevant because none of the weapons were used in the shooting. The prosecution contended that the weapons were relevant to show that defendant, who lived adjacent to the crime scene, had the opportunity to get weapons from his home and that the evidence regarding the weapons gave the jury a "complete picture of what happened." The trial court denied the motion, finding that the evidence was relevant and more probative than prejudicial and noting that defense counsel could cross-examine the witnesses to elicit testimony that the weapons were not used in the shooting.

This Court reviews for a clear abuse of discretion the trial court's decision to admit or exclude evidence. An abuse of discretion exists only if an unprejudiced person considering the facts on which the trial court acted would say that there is no justification or excuse for the trial court's decision. A trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Houston*, 261 Mich App 463, 465-466; 683 NW2d 192 (2004).

Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401; *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Generally, all relevant evidence is admissible, unless otherwise provided by law, and evidence that is not relevant is not admissible. MRE 402; *Aldrich*, *supra* at 113. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *Aldrich*, *supra* at 113.

The trial court did not abuse its discretion in holding that the evidence was relevant. The gun used in the shooting was not recovered. But the prosecutor presented evidence that defendant had a gun and that he shot Henry. Evidence that the police recovered weapons from defendant's home was relevant to show that defendant had access to weapons. *People v Taylor*, 195 Mich App 57, 61; 489 NW2d 99 (1992). The fact that defendant had access to weapons in his home adjacent to the crime scene made the shooting by defendant more probable than it would have been without the evidence.

Defendant argues that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. We disagree. Both defense counsel and the prosecutor elicited testimony that the weapons recovered from defendant's home were not used in the shooting, and both mentioned in their closing arguments that the recovered weapons were not used in the shooting. The prejudicial effect of this information did not substantially outweigh its probative value and the trial court did not abuse its discretion.¹

Defendant also argues that the trial court improperly scored offense variable (OV) 7. A sentencing court has discretion in determining the number of sentencing guideline points to be scored if the evidence presented adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision for which there is any evidence in support will be upheld. *Id.* Where effectively challenged, a sentencing factor need be proved only by a preponderance of the evidence. *People v Perez*, 255 Mich App 703, 712-713; 662 NW2d 446 (2003), vacated in part on other grounds 469 Mich 415 (2003). This Court reviews a sentencing court's scoring decision to determine whether the court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

¹ Assuming, arguendo, that the trial court erred by admitting the evidence, any error was harmless in light of the overwhelming evidence of defendant's guilt.

In calculating the sentencing guidelines, a trial court must assess fifty points under OV 7 if the victim was subjected to terrorism, sadism, torture or excessive brutality. MCL 777.37; *People v Wilson*, 265 Mich App 386, 396; 695 NW2d 351 (2005). Terrorism is conduct designed to substantially increase the fear and anxiety a victim suffers during the offense. MCL 777.37(2)(a); *Hornsby*, *supra* at 468. Sadism is conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification. MCL 777.37(2)(b).

The evidence amply supported the sentencing court's determination that defendant's conduct constituted terrorism, sadism, torture or excessive brutality. Evidence established that Henry was shot in his left knee, upper left thigh, face and chest. Henry testified that defendant fired the initial shot into his upper left thigh. Before the shooting, defendant stated that he would "kill a guy" when it came to his home. The threats were significant enough to cause Allen to call his fiancé to pick him up because he feared his safety. After the other man knocked Allen unconscious, he and defendant began to walk around Allen. The other man pulled out a gun, pointed it directly at Allen's head, and fired it a few times. After the other man shot Allen, defendant and the other man walked back to defendant's home together. The record supports a finding that the two men acted in concert and aided and abetted each other. The trial court did not err in scoring fifty points for OV 7.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Kirsten Frank Kelly